

No. 05-99078

05-99078-2006

In The Office of the Clerk  
Supreme Court of the United States

— ♦ —  
LEROY RICHMOND,

*Petitioner,*

— ♦ —  
v.

JOHN E. POTTER, *et al.*,

*Respondents.*

— ♦ —  
ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

— ♦ —  
PETITION FOR WRIT OF CERTIORARI  
WITH APPENDIX

— ♦ —  
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## QUESTIONS PRESENTED

1. Are Postal Service Officials immune from a Bivens-type action by a Postal Service employee who claims that he was injured as the result of intentional misrepresentations of fact concerning the safety of the Brentwood Processing and Distribution Center in Washington, D.C. where he worked?

2. Does the Federal Employees Compensation Act (FECA) provide the exclusive remedy to a postal service employee seriously injured by anthrax inhalation who alleges intentional misconduct by Postal Service Officials, as the proximate cause of those injuries, and who are sued in their individual capacities?

3. Does Title VII of the Civil Rights Act of 1964 preclude an action predicated on discriminatory treatment by government officials when such discriminatory treatment is not related to a personnel action?

## LIST OF PARTIES

The following is a list of parties and each corporate party's respective parent corporation and subsidiaries, if any.

*Petitioner:*

Leroy Richmond

*Respondents:*

1. John E. Potter
2. Timothy C. Haney

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A WRIT OF CERTIORARI SHOULD ISSUE  
TO RESOLVE THESE IMPORTANT  
QUESTIONS OF LAW THAT HAVE NOT  
BEEN PREVIOUSLY RAISED BEFORE NOR  
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## OPINIONS BELOW

Neither the decision of the District of Columbia Circuit (App. , infra 1a) nor the opinion of the District Court for the District of Columbia (App., infra 4a) is reported.

## STATEMENT OF JURISDICTION

The District Court dismissed Petitioner's claims against Respondents, brought under *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), on September 30, 2004. Petitioner appealed to the Court of Appeals for the D.C. Circuit ("Appellate Court"), which affirmed the District Court's dismissal on November 7, 2005.

This petition for writ of certiorari is timely, as it is being filed within ninety (90) days of the November 7, 2005 Appellate Court affirmation of the District Court's decision.

If this petition for writ of certiorari is granted, the U.S. Supreme Court will have jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).



## **STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED**

### **U.S. Constitution, Amendment V:**

No person shall be . . . deprived of life, liberty,  
or property, without due process of law . . .

### **Federal Employees Compensation Act, 5 U.S.C. § 8102(a):**

(a) The United States shall pay compensation  
as specified by this subchapter for the  
disability or death of an employee resulting  
from personal injury sustained while in the  
performance of his duty . . .

### **Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16:**

#### **Employment by Federal Government**

(a) Discriminatory practices prohibited;  
employees or applicants for employment  
subject to coverage

All personnel actions affecting employees  
or applicants for employment (except with  
regard to aliens employed outside the limits of  
the United States) in military departments as  
defined in section 102 of title 5, in executive  
agencies as defined in section 105 of title 5  
(including employees and applicants for  
employment who are paid from  
nonappropriated funds), in the United States

Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the Government Accountability Office, and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

## **STATEMENT OF THE CASE**

### **Procedural History**

This action arises from the wilfully deceitful, shameful and unlawful actions of the Respondents, who intentionally and affirmatively created or increased the danger of Petitioner's exposure to deadly anthrax contamination at his workplace and purposefully prevented Petitioner from protecting himself during the anthrax crisis in Washington, D.C. in October 2001. The Petitioner's complaint alleged that Respondents' intentional and affirmative acts deprived Petitioner of his substantive due process rights secured by the Fifth Amendment to the U.S. Constitution and further alleges that their actions were discriminatory and violated Appellant's rights under the equal protection component of the Fifth Amendment.

The Respondents filed a motion to dismiss, which Petitioner opposed. The district court, without the

benefit of argument, by Memorandum Opinion and Order dated September 30, 2004 granted Respondents' motion to dismiss ruling that Petitioner's substantive due process claim and Fifth Amendment equal protection claims were not actionable. In issuing its ruling, the district court, for the most part, accepted the allegations of Petitioner's complaint as true, App. 12a-14a, and properly identified the gravamen of his complaint as well. *Id.* at 14.a Nevertheless, the district court concluded that "Plaintiff's claim fails to meet the stringent standards necessary to maintain a Bivens action." *Id.* at 17a.

To recover in a Bivens action, the district court properly determined that Petitioner had to meet three criteria:

- the suit must name the relevant federal officials in their "individual capacities;"
- the injury asserted must qualify as a fundamental constitutional right that was clearly established at the time of the alleged violations in order to overcome "qualified immunity;" and
- there must be "no special factors counseling hesitation in the absence of affirmative action by Congress."

*Id.* at 17a.

The district court went on to conclude that Petitioner had sued the Respondents in their

individual capacity, thereby meeting the first criteria. However, the district court determined that the Petitioner failed to meet the first prong of the qualified immunity test. *Id.* at 26a

Given the relevant laws, for Plaintiff to successfully evade dismissal of his substantive due process claim (Count I), he must (1) allege that Defendants' actions "shocked the conscience" and, (2) because deliberate indifference is asserted, allege facts supporting an inference that special circumstances exist to make such indifference "conscious shocking." Plaintiff has failed to allege the required special circumstances, and the vast majority of case law stands for the proposition that -- without custody -- such special circumstances do not exist.

*Id.*

The district court further determined that even if the Petitioner could establish that his constitutional right to substantive due process was violated by the "shocking" misrepresentations and choices of Defendants, Plaintiff still cannot show that it was 'clearly established' that Defendants would have been aware that their conduct was unlawful." *Id.* at 28a.

With respect to Petitioner's equal protection claim, the district court dismissed that claim because, it determined "The First Amended Complaint contains no allegation that Defendants